No. 92-1933

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

PATUXENT INSTITUTION BOARD OF REVIEW,

Petitioner

v.

CLARENCE J. HANCOCK,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner has conceded and the Court of Appeals of Maryland has found that Clarence J. Hancock was paroled by the Patuxent Institution Board of Review on August 8, 1990. Immediately upon paroling Mr. Hancock, Patuxent began the process of revoking his parole based on events that occurred long before the grant of parole. The Board of Review revoked Mr. Hancock's parole based on a claim that he had "failed to comply with the instructions and directives of his therapist [and] he has thwarted the purpose and mission of the [Patuxent] Institution." This case thus presents the following question:

Can Maryland lawfully revoke Mr. Hancock's parole without prior notice to him prohibiting the conduct which was the basis for the alleged violation?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Clarence J. Hancock, by his attorneys and pursuant to Supreme Court Rule 15, respectfully requests that this Court deny the Petition for Writ of Certiorari which seeks to review the judgment of the Court of Appeals of Maryland. The opinion below, Patuxent v. Hancock, is reported at 329 Md. 556, 620 A.2d 917.

STATEMENT OF THE CASE

Clarence J. Hancock was convicted of murder and other offenses by the Circuit Court for Prince George's County, Maryland. He was sentenced in 1976 to a term of life imprisonment followed by a consecutive determinate term of years. Id. at 562, 620 A.2d at 920. There is no dispute that he has been a model prisoner. Since

his incarceration he has neither broken any law nor been charged with violating any prison disciplinary rule. Id. at 589, 620 A.2d at 933. He was admitted to the Patuxent Institution in 1977 and his progress in rehabilitation resulted in work-release status, school-release, and both accompanied and unaccompanied leaves. Id. at 562-63, 620 A.2d at 920. He attended college, worked as a copy machine repairer, and remarried. Petitioner here, the Patuxent Institution Board of Review, voted to recommend Mr. Hancock for parole in 1987, but the Governor of Maryland denied the request. Id., 620 A.2d at 920-21.

On July 24, 1990, the Circuit Court for Baltimore City, Maryland, granted Mr. Hancock's petition for a writ of habeas corpus and ordered his release on parole, Petition for Writ of Certiorari, Appendix ("App.") at 129a-134a, unless "[Mr. Hancock] has committed a new offense or if he has violated a major disciplinary rule of the [Patuxent] Institution." Id. at 132a. The basis for the Circuit Court's decision was the opinion of the Court of Appeals of Maryland in Gluckstern v. Sutton, 319 Md. 634, 574 A.2d 898, cert. denied sub nom. Henneberry v. Sutton, 498 U.S. 950 (1990).

No appeal was taken from the Circuit Court for Baltimore City's ruling. Rather, the Board of Review paroled Mr. Hancock. As soon as Mr. Hancock had signed the Order of Parole, App. at 122a-124a, Patuxent Institution served him with a parole revocation warrant and notice of a preliminary hearing. Patuxent immediately found probable cause to believe that Mr. Hancock had violated the

terms and conditions of parole. 329 Md. at 567, 620 A.2d at 922. Patuxent kept Mr. Hancock in prison pending a formal parole revocation hearing. The Board officially revoked Mr. Hancock's parole, stating as its rationale "that Mr. Hancock has failed to comply with the instructions and directives of his therapist [and] he has thwarted the purpose and mission of the [Patuxent] Institution." App. at 120a. The terms and conditions listed in Mr. Hancock's parole order, id. at 123a-128a, did not require Mr. Hancock to attend therapy.

Mr. Hancock appealed the parole revocation decision to the Circuit Court for Howard County, Maryland, which affirmed the Board of Review. Id. at 113a-115a. The Court of Special Appeals of Maryland, however, reversed the Circuit Court for Howard County. Id. at 97a. The Court of Appeals of Maryland granted certiorari and affirmed the decision of the intermediate appellate court with some modification. The Court of Appeals found that due process had been denied Mr. Hancock by revoking parole based on noncriminal behavior without first putting Mr. Hancock on notice that such behavior would in fact be a parole violation. 329 Md. at 582, 620 A.2d at 930. The Court of Appeals stated: "So far as this record reveals, the respondent was first notified of the conditions of his parole at the same time that he was informed that he violated one of them." Id. at 589, 620 A.2d at 933. The Court of Appeals also found, based on state law, that the Board of Review was estopped from asserting that Mr. Hancock was now ineligible for parole by its failure to appeal the decision of the Circuit Court for

Baltimore City. Id. at 587-88, 591, 620 A.2d at 932-33, 934-35. While three judges dissented, they did so on state law grounds. Id. at 592-99, 620 A.2d at 935-38.

Chief Justice Rehnquist, sitting as Circuit Judge for the United States Court of Appeals for the Fourth Circuit, denied the Board's application for a stay of the mandate of the Court of Appeals of Maryland. App. at 1a.

REASONS WHY THE PETITION SHOULD BE DENIED

1. **Neither the decision below nor the record raises the first question presented in the Petition as Mr. Hancock was paroled, not merely promised parole in the future.**

The first question presented by Patuxent raises an alleged conflict between the decision below and Jago v. Van Curen, 454 U.S. 14 (1981). The question presumes, however, that Mr. Hancock was never accorded the rights and privileges of a parolee because he was not immediately released from prison. The Court of Appeals of Maryland has found the facts to be otherwise. Mr. Hancock's parole was effective August 8, 1990. 329 Md. at 565, 586, 620 A.2d at 921, 932. Indeed, Petitioner has previously admitted that it paroled Mr. Hancock. Id. at 591, 620 A.2d at 934. The United States Supreme Court does not exercise jurisdiction simply to review state court findings of fact. See Grayson v. Harris, 267 U.S. 352, 358 (1925). See also Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508, 509 (1924); Houston Oil Co. v. Goodrich, 245 U.S. 440, 441 (1918). Since it is conceded by the Board of Review and confirmed by the Court of Appeals that Mr. Hancock was paroled pursuant to Md. Ann. Code, Art. 31B, on August

8, 1990, Jago is inapposite and Morrissey v. Brewer, 408 U.S. 471 (1972), governs the process due Mr. Hancock.

In Jago, the prisoner was notified by the Ohio Adult Parole Authority that he would be granted parole "on or after" a future date. 454 U.S. at 14. Prior to release, the Authority determined that the prisoner had lied on his parole application. Id. at 15. The question before this Court was whether the Authority's decision to rescind its previous promise to grant parole required the due process protections of a parole revocation proceeding. Under Ohio law, the Authority's right to rescind a parole order before its effective date was well settled. Id. at 22-23 (Blackmun, J., concurring in the result). This Court found that due process protections do not extend to "mutually explicit understandings" between prisoners and prison officials. Id. at 18-19.

The contrast between Jago and the decision below cannot be more clear. The Board of Review did not grant parole effective at a later date but instead paroled Mr. Hancock effective August 8, 1990, the day he received and signed the Order of Parole. Under Maryland law, parole is effected once the parolee signs the Order of Parole acknowledging the terms and conditions of release. 329 Md. at 575, 620 A.2d at 926. See also Murray v. Swenson, 196 Md. 222, 229, 76 A.2d 150, 153 (1950) (prisoner may accept or reject conditions of parole). Unlike in Jago, Mr. Hancock committed no fraud to obtain parole. 329 Md. at 581, 620 A.2d at 929. Under the Patuxent statute, Md. Ann. Code, Art. 31B (1957, 1990 Repl. Vol.), Mr. Hancock's Order of Parole created a protected liberty

interest in retaining parole which could not be abrogated by Patuxent without due process of law. What occurred below under Maryland law was a parole revocation hearing, plain and simple. It was a parole revocation hearing without the constitutionally required notice to the parolee of the terms and conditions of parole. The Board's actions following the grant of parole on August 8, 1990, were not the administrative rescission of a decision to recommend parole at a future date as in Jago, but rather a violation of Mr. Hancock's right to be apprised of the conditions of his existing parole so that he could maintain his liberty.

Nor is the decision below in conflict with the other opinions cited by Petitioner.

The Board's citation of Bryant v. State, 848 F.2d 492 (4th Cir. 1988), for the contention that the Patuxent Institution statute creates no protected liberty interest in retaining parole status, Petition for Writ of Certiorari at 24, is disingenuous. It was the predecessor of the Maryland Parole Commission statute, Md. Ann. Code, Art. 41, §4-501 et seq. (1957, 1990 Repl. Vol. & 1992 Cum. Supp.), not the Patuxent Institution statute, Art. 31B, that was the subject of interpretation by the United States Court of Appeals for the Fourth Circuit. This is evidenced by the opinion of the United States District Court for the District of Maryland, a copy of which is appended hereto. That decision, the subject of the appeal in Bryant, clearly involves the Parole Commission statute, not the Patuxent Institution statute. See Apx. at 7-8.

The Board of Review is well aware that the Maryland Parole Commission is separate and distinct from the Patuxent Institution Board of Review under Maryland law. Mr. Hancock's parole was granted pursuant to Art. 31B, §11, not Art. 41, §4-506. The paroling authorities are completely independent of each other. Furthermore, Bryant concerns the expectancy of parole, not an actual parole and the constitutional protections surrounding parole revocation required by Morrissey, supra.

Petitioner fares no better with the other authorities cited in support of its allegation of a conflict between the decision below and the decisions of other courts, as those opinions do not address the claims of a parolee such as Mr. Hancock, who is entitled to the protections required by Morrissey, supra.

In Ingrassia v. Purkett, 985 F.2d 987 (8th Cir. 1993), the prisoner's wife was allegedly advised by the chairperson of the Missouri Board of Pardon and Parole that the Board "intended to parole Ingrassia in May of 1983, upon his continued good conduct and participation in . . . training." Id. at 988. The Eighth Circuit found that neither these statements nor the prisoner's participation in training ripened the mere expectancy of parole into a constitutionally protected liberty interest. Id.

In Inmates of Orient Correctional Institute v. Ohio State Adult Parole Authority, 929 F.2d 233 (6th Cir. 1991), prisoners who received "on or after" parole dates subject to the approval of an acceptable out-of-prison placement plan, id. at 234, challenged the rescission of their "on or after" dates after placement became

difficult. Relying on Jago, supra, the Sixth Circuit found that Ohio law created no protected liberty interest in the expectancy of parole.

In Winters v. Solem, 444 N.W.2d 722 (S.D. 1989), the unexecuted grant of parole was expressly made conditional on a subsequent event. In Johnson v. Pennsylvania Board of Probation and Parole, 110 Pa. Commw. 42, 532 A.2d 50 (1987), the prisoner never attained the status of a parolee under Pennsylvania law.

To summarize, because Mr. Hancock was paroled pursuant to Maryland law, the decision below is not in conflict with the decisions of this Court, the federal courts of appeal, or decisions of other state courts, and the first question presented in the Petition is not properly before the Court.

2. **The second question presented in the Petition does not warrant review by this Court because it is beyond dispute that a parolee is entitled to notice of the conditions of parole prior to revocation for allegedly violating a parole condition.**

Conceding, as it must, that Mr. Hancock had a protected liberty interest in retaining his parole status created by Maryland law, the Board of Review claims authority to revoke parole without informing the parolee of what he or she must do to comply with the terms and conditions of parole. Petition for Writ of Certiorari at 25-32. Petitioner asserts that this Court has never decided this issue. Id. at 25, 27. But see Douglas v. Buder, 412 U.S. 430, 432 (1973) (per curiam) (due process requires that probationer receive fair warning that certain types of conduct may lead to revocation) (relying upon Bouie v. City of Columbia, 378 U.S. 347 (1964)).

The holding of the Court of Appeals of Maryland is consistent with precedent and unexceptionable:

> Because the conduct on the basis of which the revocation was premised was not criminal -- the petitioner has conceded that the respondent has not violated any state or federal law or municipal ordinance -- and did not constitute an institutional infraction, i.e., it was not the institutional equivalent of criminal conduct, we hold that the respondent's parole was improperly revoked, he not having been notified, in advance, of the condition allegedly violated. Both common sense and due process demands this result.

329 Md. at 589, 620 A.2d at 933.

The Court of Appeals found the following facts in support of its holding:

> [T]he respondent's parole agreement did not contain any condition that he attend therapy, nor was the respondent made aware that his progress or, more accurately, Dr. Farrell's perception of his progress, in therapy was an actual condition of parole which, if violated, would result in loss of liberty.

Id. at 589-90, 620 A.2d at 933-34.

As stated in Morrissey v. Brewer, 408 U.S. 471, 482 (1972), "[t]he parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions." This Court's statement clearly means that the parolee is entitled to know the parole conditions prior to any attempt at

revocation for noncriminal conduct, which is all the decision below holds.

The Board of Review asserts that this Court should grant certiorari to determine whether "the Constitution is so rigid that in order to revoke the parole of an individual who currently presents a risk to society, prison officials must have anticipated and imposed specific parole conditions for all conduct that manifests this dangerousness." Petition for Writ of Certiorari at 31-32. Again, the factual premise upon which Petitioner attempts to construct this purported dilemma is lacking in the record. No fact-finder, neither the Board of Review nor the Maryland courts, has ever found that Mr. Hancock was a "danger" or "risk" to society. See, e.g., App. at 116a-121a (no finding by Board of danger to society). There is no objective and concrete evidence of conduct on the part of Mr. Hancock since the beginning of his incarceration that could possibly be construed as either a parole violation or as manifesting a menace to himself or others. Mr. Hancock received accompanied leaves to the community in 1984. 329 Md. at 562, 620 A.2d at 920. In 1985, he progressed to work-release and school-release status. Id. at 562-63, 620 A.2d at 920. In 1986, Mr. Hancock received permission to leave the prison without being accompanied by prison authorities. Id. at 563, 620 A.2d at 920. In its letter to the Governor of Maryland of February 5, 1988, recommending Mr. Hancock for parole, Patuxent stated that Mr. Hancock was not a danger to society. Mr. Hancock is in fact now working and contributing to his community. Without evidence of

a parole violation or any fact-finding of dangerousness, Patuxent's attempt at parole revocation cannot stand. See Douglas v. Buder, supra, 412 U.S. at 432 (finding of probation violation so devoid of evidentiary support as to be invalid under Due Process Clause); Arciniega v. Freeman, 404 U.S. 4 (1971) (per curiam) (no satisfactory evidence of parole violation in record).

"As a matter of both constitutional law and common sense, probationers and parolees can reasonably be expected to follow only those probation conditions of which they are aware." Cohen, Neil P. & Gobert, James J., The Law of Probation and Parole, §5.04, at 193 (1983 & 1992 Cum. Supp.) (citing United States v. Dane, 570 F.2d 840 (9th Cir. 1977), cert. denied, 436 U.S. 959 (1978)). Patuxent's reliance upon this treatise to support its contention that lower courts need guidance in the area of the law encompassed by the second question presented, Petition for Writ of Certiorari at 27, is misleading. The authors of the treatise, at the section cited in the Petition, are discussing ambiguous or vague conditions of parole or probation, not the constitutionally required notice of those conditions which must be given to the parolee or probationer. While the Court of Special Appeals of Maryland, in an alternative holding, found the condition allegedly violated by Mr. Hancock "vague, uncertain, and indefinite," App. at 109a, the Court of Appeals of Maryland expressly declined to reach this issue because it held that no notice of the condition was given to Mr. Hancock. See 329 Md. at 590 n.18, 620 A.2d at 934. Because the Court of Appeals of Maryland expressly declined to pass upon the vagueness

of the parole condition allegedly violated, that issue is not now before the Court. If the question was not passed upon below, certiorari should not be granted on the issue. See United States v. Williams, ____ U.S. ____, ____, 112 S. Ct. 1735, 1738 (1992). Contrary to the Board's assertion, the lower courts are in no need of guidance on the issue of whether a parolee should be informed in advance of what he or she must do to stay on parole.

Nor is there any conflict between the decision below and those of other courts on the issue raised by the second question in the Petition. Patuxent cites Benboe v. State, 738 P.2d 356 (Alaska App. 1987), and State v. Mace, 154 Vt. 430, 578 A.2d 104 (1990), as conflicting authorities on this point. Petition for Writ of Certiorari at 28. These decisions, however, neither conflict with each other nor with the decision below. In Mace, the defendant's probation agreement, which the defendant signed prior to the occurrence of the conduct giving rise to the citation for probation violation, explicitly required that he "attend, participate, and complete" a specified therapeutic regimen. 154 Vt. at 432, 578 A.2d at 105. The terms and conditions of Mr. Hancock's parole, App. at 123a-128a, contain no requirement that he attend therapy. In Mace, the basis for the violation occurred after the defendant had been apprised of the condition allegedly violated. 154 Vt. at 432, 578 A.2d at 105. In the instant case, the facts as found by the Maryland courts are otherwise. Mr. Hancock was not "notified, in advance, of the condition allegedly violated." 329 Md. at 589, 620 A.2d at 933. In Benboe, the condition allegedly violated was

found not to be an actual condition of probation. 738 P.2d at 360. In the alternative, the court found that the defendant had not violated the condition. Id. at 362. In short, Benboe is not in conflict with Mace, and Mace is not in conflict with the decision below.

The Board of Review asserts that "[t]he facts surrounding respondent's incarceration and parole in this case demonstrate that he was on fair notice that his failure to fully participate in therapy could lead to the revocation of his parole." Petition for Writ of Certiorari at 28-29. The Maryland courts, however, have found the facts to be otherwise. See 329 Md. at 589, 620 A.2d at 933 ("So far as this record reveals, the respondent was first notified of the conditions of his parole at the same time he was informed that he violated one of them."). This Court does not grant certiorari "to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925).

"It is an essential component of due process that individuals be given fair warning of those acts that may lead to a loss of liberty." United States v. Dane, 570 F.2d 840, 843 (9th Cir. 1977), cert. denied, 436 U.S. 959 (1978) (citing Bouie v. City of Columbia, 378 U.S. 347 (1964); Connally v. General Construction Co., 269 U.S. 385 (1926)). "[W]here the proscribed acts are not criminal, due process mandates that the petitioner cannot be subjected to a forfeiture of his liberty for those acts unless he is given prior fair warning." Dane, 570 F.2d at 844. That is the holding of the Court of Appeals of Maryland. This holding is

unremarkable. It is based primarily on a construction of Maryland law and arises out of a singular set of circumstances whereby the Board of Review paroled Mr. Hancock pursuant to an order of the Circuit Court for Baltimore City rather than appealing that court's decision. The Board is now attempting to "excuse its own omission," 329 Md. at 585, 620 A.2d at 931, to follow Maryland's rules of appellate practice.

Maryland has long followed this principle:

> A parolee is not expected or required at once to achieve perfection. If his conduct is that of the ordinary well-behaved person, with no more lapses than all people have, with no serious offenses charged against him, and with no indication that he intends in the future to pursue the course which led to his original conviction, the courts and probation officers should not seek for unusual and irrelevant grounds upon which to deprive him of his freedom.

Swan v. State, 200 Md. 420, 430, 90 A.2d 690, 695 (1952). When the Patuxent Institution Board of Review departed from this principle, its actions were reversed by the Maryland courts.

The holding of the Court of Appeals of Maryland is plainly correct. "All are entitled to be informed of what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). "[W]hen notice is a person's due, process which is a mere gesture is not due process." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950).

As the factual scenario that gave rise to the decision below is highly unlikely to recur in Maryland or elsewhere, and as there

is no conflict with decisions of the federal courts or state courts of last resort, there is no need for the exercise of this Court's discretionary jurisdiction. See Forsyth v. City of Hammond, 166 U.S. 506, 514-15 (1897).

CONCLUSION

For these reasons, Respondent prays that this Court deny the Petition for Writ of Certiorari and grant to the Respondent such other and further relief as the nature of his cause may require.

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APPENDIX

A copy of the opinion of the United States District Court for the District of Maryland in Bryant v. State of Maryland, Civil No. M-86-2568 (Oct. 3, 1986) (unreported), is appended to the Respondent's Brief in Opposition to demonstrate that the Petitioner's reliance upon Bryant v. State, 848 F.2d 492 (4th Cir. 1988), to argue that a conflict exists between the decision below and a decision of the United States Court of Appeals for the Fourth Circuit, Petition for Writ of Certiorari at 24, is misleading. Both the District Court and the Fourth Circuit construed the Maryland Parole Commission statute, not the Patuxent Institution statute. Respondent was paroled pursuant to the Patuxent Institution statute, Md. Ann. Code, Art. 31B (1957, 1990 Repl. Vol.).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BILLIE AUSTIN BRYANT	:	
v.	:	CIVIL ACTION NO. M-86-2568
STATE OF MARYLAND	:	

MEMORANDUM AND ORDER

Billie Austin Bryant, petitioner, acting pro se, seeks federal habeas corpus relief in relation to his imprisonment as a result of his conviction of bank robbery in the Circuit Court for Prince George's County on April 14, 1969 for which he received a 20-year sentence. Petitioner asserts four grounds for review: 1) the indictment upon which he was convicted was amended the day of trial; 2) he was denied an appeal from an unfavorable decision in a post-conviction proceeding and was denied a request for an attorney to perfect such appeal; 3) he was denied counsel and an evidentiary hearing in a second post-conviction proceeding after which he was denied an appeal or counsel to perfect such appeal; and 4) he was denied a parole hearing on his Maryland sentence.

It appearing that the petitioner has exhausted his state remedies, the court will examine whether petitioner's claims merit issuing service.

ENTERED
OCT 3 1986

I. The Amended Indictment

Petitioner alleges that his due process rights under the Fifth and Fourteenth Amendments were violated when the prosecutor was allowed to amend the indictment on the day of trial to change the name of the person robbed in the bank from Jack Hay, the manager, to Betty Mosely, the clerk, and to change the dollar amount involved from $3,500 to $1,000 (Transcript of Proceedings, Attached to Complaint, at 3-6).

The sufficiency of an indictment is generally not subject to challenge in habeas corpus proceedings unless a defect in the indictment would strip the trial court of jurisdiction. Woolsey v. Best, 299 U.S. 1 (1936). An indictment misleading the defendant as to the charge, however, might be grounds for habeas corpus relief. Snead v. Smyth, 273 F.2d 838, 840-41 (4th Cir. 1959); see also Hayes v. Peyton, 364 F.2d 303 (4th Cir.), cert. denied, 385 U.S. 981 (1966). An indictment is sufficient if it contains elements of the offense charged, fairly informs the defendant of the charge against which he must defend, and enables him to plead judgment as a bar to future prosecutions for the same offense. Hamling v. United States, 418 U.S. 87, 117-18 (1974); United States v. Previti, 644 F.2d 318 (4th Cir. 1981). The Fourth Circuit has likewise held that a superseding indictment on the eve of trial did not deprive the defendant of a fair trial where defendant was given

fair notice of the charge. United States v. Diamond, 561 F.2d 557 (4th Cir. 1977).

In the transcript submitted by petitioner, it appears that his attorney admitted that he had been told a month before trial that Betty Mosely was the person robbed. If there was any error in allowing the amendment, which the court believes there was not, it was not of the type which would strip the trial court of its jurisdiction to hear the case nor of sufficient gravity to deny due process to the petitioner.

Ground I of the Petition will be dismissed.

II. Right to Counsel for Appeal of a Post-Conviction Hearing

Petitioner alleges that he was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments when he was not appointed an attorney to perfect appeals to the Court of Special Appeals after two post-conviction hearings.

Based upon due process and equal protection rights, convicted indigents are entitled to be represented by counsel on their first appeal. Ross v. Moffitt, 417 U.S. 600, 611 (1974); Douglas v. California, 372 U.S. 353, 357 (1963).

This right does not extend to the process of seeking additional, discretionary appeals. Ross, 417 U.S. at 615. Once, through the assistance of counsel, a record is established on the appeal as of right, sufficient record is available

for the higher court to review and consider whether or not to hear the discretionary appeal. Id.

Md. Ann. Code art. 27, § 645A states, in pertinent part:

> "(a) Right to institute proceeding to set aside or correct sentence. - Any person convicted of a crime and either incarcerated under sentence of death or imprisonment or on parole or probation, including any person confined or on parole or probation as a result of a proceeding before the District Court who claims that the sentence or judgment was imposed in violation of the Constitution of the United States or the Constitution or laws of this State, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the sentence is otherwise subject to collateral attack upon any ground of alleged error which would otherwise be available under a writ of habeas corpus, writ of coram nobis, or other common-law or statutory remedy, may institute a proceeding under this subtitle in the circuit court for the county or the Criminal Court of Baltimore to set aside or correct the sentence, provided the alleged error has not been previously and finally litigated or waived in the proceedings resulting in the conviction, or in any other proceeding that the petitioner has taken to secure relief from his conviction.

The statute establishes a right to appeal certain issues not waived or previously and finally litigated to the circuit court in the appropriate jurisdiction. Assuming, arguendo, that the issues involved in petitioner's two post-conviction hearings were not previously and finally litigated, the proceedings in the circuit court would constitute petitioner's "first appeal of right." Under Ross v. Moffitt, petitioner is not entitled to assistance of an attorney to perfect a discretionary appeal therefrom. 417 U.S. 615.

Ground II of the petition will be dismissed.

III. Right to an Evidentiary Hearing at the Post-Conviction Proceedings

Petitioner claims that he was not appointed counsel at his second post-conviction proceeding. The record submitted, however, indicates otherwise. The Opinion and Order of Court labeled Group Exhibit "B" states: "The State's Attorney withdrew his motion, and counsel then proceeded to argue the merits of the petition." (Group Exhibit B at 1). Also, copies were sent by the court to the Office of the Public Defender. (Id. at 4).

An evidentiary hearing is required on a first petition under Maryland's Uniform Post Conviction Procedure Act, but not on a subsequent petition. Rule 4-406(a), Md. Rules of Procedure. The issue decided in petitioner's second post-conviction proceeding was "does the setting aside of a sentence which a consecutive sentence is to succeed have the effect of causing the consecutive sentence to run from the date of its imposition?" (Group Exhibit B at 2). There was no need to present factual evidence. Moreover, the Opinion reflects that there was a hearing, during which counsel argued the merits of the petition. Petitioner could have put on any evidence at that time.

Ground III of the petition will be dismissed.

IV. Parole Letter

Petitioner claims he was denied due process and equal

protection by the failure of the Attorney General to respond to his letter requesting a parole hearing.

Petitioner did not raise this issue in either a post-conviction proceeding or in a complaint to the Inmate Grievance Commission. However, claims not directly or indirectly challenging the validity of the conviction are not cognizable under Maryland post-conviction proceedings. Knox v. Director, Patuxent Institution, 1 Md. App. 678, 680 (1967). Claims such as petitioner's would be governed by the Inmate Grievance Commission, except that petitioner is not a "person confined to an institution within the Division of Correction, or otherwise in the custody of the Commission of Correction, or confined to the Patuxent Institution." Md. Ann. Code art. 41, § 204F(d). It would seem, therefore, that petitioner has no state remedy to exhaust.

Mere existence of a parole system does not give an inmate sufficient parole expectation to require the state to accord him a level of due process protection similar to that for parole revocation proceedings. Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 8-10 (1979); Wetzel v. Edwards, 635 F.2d 283 (4th Cir. 1980). The extent, if any, of a prisoner's legitimate expectation of parole depends on the structure of the state statute. Greenholtz, 442 U.S. at 11-12. In Greenholtz, the Supreme Court accepted the argument that a Nebraska statute, which provided that the parole board "shall" order the prisoner's

release unless certain conditions are established, provided some expectation of parole release. Id. at 12. The Maryland statute has no such provision. The matters to be considered at a parole hearing in Maryland are as follows:

> "Each hearing examiner and Commission member determining if an inmate is suitable for release on parole shall consider:
> (1) The circumstances surrounding the crime;
> (2) The physical, mental, and moral qualification of the inmate eligible for parole;
> (3) The progress of the inmate during his confinement;
> (4) Whether or not there is reasonable probability that the inmate, if released on parole, will remain at liberty without violating the law; and
> (5) Whether or not release on parole of the inmate is compatible with the welfare of society."

Md. Ann. Code art. 41, § 112 (1976).

Section 112 does not contain language comparable to the mandatory language of the Nebraska statute sufficient to give an inmate a legitimate expectation of release. Therefore, petitioner has no right to be afforded due process protection.

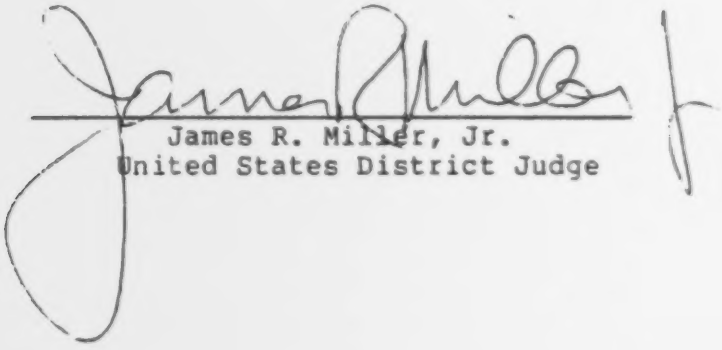
Petitioner has stated no facts in Ground IV to support any equal protection argument either. Ground IV, therefore, will be dismissed.

Accordingly, it is this 3rd day of October, 1986, by the United States District Court for the District of Maryland, ORDERED:

1) That leave to proceed in forma pauperis is hereby GRANTED.

2) That petitioner's complaint is hereby DISMISSED, pursuant to 28 U.S.C. § 1915(d), as frivolous.

3) That the Clerk mail a copy of this Memorandum and Order to the petitioner, Billie Austin Bryant, #93746-131, P. O. Box 1000, Marion, Illinois 62959, and to the United States Attorney for the District of Maryland.



James R. Miller, Jr.
United States District Judge

Certificate of Service

I HEREBY CERTIFY that on this 6th day of August, 1993, three copies of the foregoing Respondent's Brief in Opposition were mailed, postage prepaid, to Andrew H. Baida and Carmen M. Shepard, Assistant Attorneys General and counsel for Petitioner, 200 St. Paul Place, 20th Floor, Baltimore, Maryland, 21202.

Stuart R. Cohen

Stuart R. Cohen

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